1966

Mary Louise Gerard v. Preston L. Young and Unice Young : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY LOUISE GERARD,
Plaintiff-Respondent,

vs.

PRESTON L. YOUNG and
UNICE YOUNG,
Defendants-Appellants.

Case No.
10712

BRIEF OF APPELLANTS

Appeal from Judgment of the Third District Court
of Salt Lake County
Honorable Stewart M. Hanson, Judge

BRIDWELL AND RIMENSBERGER
Attorneys for Defendants-Appellants
By GEORGE E. BRIDWELL
506 Judge Building
Salt Lake City, Utah

K. SAMUEL KING
Attorney for Plaintiff-Respondent
409 Boston Building
Salt Lake City, Utah

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

CONSTITUTIONAL CITATIONS

LEGAL TEXTS

OTHER PUBLICATIONS

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY LOUISE GERARD,
Plaintiff-Respondent,

vs.

PRESTON L. YOUNG and UNICE YOUNG,
Defendants-Appellants.

Case No. 10712

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action brought by Plaintiff-Respondent seeking to forfeit a lease for a term of years based on Defendants-Appellants' alleged "payoffs" on pinball machines and punch boards. Delinquent rental is not an issue.

This action has been treated as if in unlawful detainer under 78-36-1, et seq., 1953 UCA, though not pleaded. The pleading theory of plaintiff is that a lease provision has been violated by defendants and the lease should be rescinded, (R2, Paragraph 6).

DISPOSITION IN LOWER COURT

The following hurried sequence of events took place:

1. Complaint for lease cancellation and for restitution of the leasehold was filed June 13, 1966 (R. 1). Time for answer was shortened to three days, arranged ex parte, with no reference to statutory authority, if any, to do it (R. 1, 2, 3). 78-36-8, 1953 UCA seems to require a rental delinquency in order for the court to shorten time of answer.

2. Answer was filed June 15, denying gambling or right to restitution of premises if there was gambling (R. 8).

3. Defendants-Appellants filed motion for summary judgment on June 15, 1966 (R. 12), noticed for argument July 5, 1966 (R. 11).

4. Counsel for plaintiff-respondent obtained special pretrial setting for 12 p.m., June 22, 1966, though notice of readiness for trial was not filed by plaintiff until July 1, 1966 (R. 22).

5. There was no judge for the special pretrial hearing on June 22, 1966, so plaintiff continued it to June 24, 1966. On June 24, the pretrial judge ordered a further pretrial to be held on September 30, 1966 and placed the case on the jury trial calendar for October 26, 1966.

6. On July 30, 1966, plaintiff-respondent filed motion for summary judgment, also to be heard on July 5, 1966 (R. 14).

7. Plaintiff-respondent's motion for summary judgment was supported by three affidavits alleging receipts of "payoffs" at the leasehold premises, (R. 16, 17, 19). Defendants-appellants filed an affidavit in opposition to plaintiff's affidavits stating there was no acquaintance with plaintiff's affiants and that defendants-appellants were entitled to examine those persons under oath and test their veracity and interest in the subject of the litigation to overcome the self-serving nature and hearsay characteristics in those affidavits submitted by plaintiff, (R. 23).

8. Both motions for summary judgment were argued July 5, 1966.

9. Memorandum decision granting plaintiff-respondent's motion for summary judgment was issued by the Trial Court July 6, 1966 (R. 25).

10. On July 8, 1966 defendants-appellants made motion for reconsideration of the memorandum decision (R. 29), which was supported by further affidavit of defendants-appellants stating that the affidavits pertaining to "payoffs" were, to the best knowledge and belief of affiant, false (R. 26).

11. Based upon the motion to reconsider, with supporting affidavit, the Court ordered both parties' motions for summary judgment denied and ordered that the matter remain on the pretrial calendar for Friday, September 30, 1966 and that Trial be held Wednesday, October 26, 1966, as previously scheduled. The Court in the order of July 8, affirmatively found that there were questions of fact to be determined at trial (R. 30).

12. On July 13, again ex parte, plaintiff's counsel obtained a trial setting for July 19, 1966 (R. 34), despite the July 8 order that trial would be October 26, 1966 (R. 30).

13. On July 13, 1966, defendants-appellants filed objection to the July 19 trial setting (R. 33), noticing hearing on objection for July 18, 1966 (R. 31). Hearing on the objection was had before the Honorable Albert H. Ellett, who refused to proceed with the matter since the special trial setting had been obtained before the Honorable Stewart M. Hanson. The court was on vacation on July 19, 1966, with no reporter and no jury was on hand, despite defendants-appellants demand for jury having been filed and a jury fee having been paid (R. 32).

Trial was not held July 19, 1966, though plaintiff's counsel offered to obtain a court reporter and pay for him. Plaintiff's counsel was not, however, successful in persuading the clerk of the court to summons a jury, in the face of appellant's objection.

14. July 19, 1966, defendants-appellants filed petition to the Supreme Court of Utah for an interlocutory appeal, which was denied by the court in Case 10692, July 27, 1966.

15. Under date of July 19, 1966, plaintiff-respondent noticed the taking of defendant's deposition for July 26, 1966. Notice was filed with the Court July 27, 1966 (R. 34).

16. The deposition of defendant, Preston L. Young, was taken July 29, 1966 (R. 60). He refused to answer

questions concerning pinballs and punch boards based on the self-incrimination provisions of the 5th amendment to the United States Constitution.

17. Under date of July 21, 1966 plaintiff-respondent again filed motion for summary judgment based upon previous allegations and affidavits set forth in the first motion for summary judgment heard on July 5, 1966. The motion was filed July 27. (R. 36).

18. The same matter having already been argued and ruled on by the Trial Court, was again heard and agrued on August 9, 1966.

19. On August 9, 1966, the day of the second argument, the Trial Court made and entered its order granting plaintiff-respondent's latest motion for summary judgment, from which order this appeal is taken.

RELIEF SOUGHT ON APPEAL

1. Defendants-appellants seek decision that having pinballs and punch boards on cafe premises, even if "payoffs" are made, is not sufficient grounds to found an action in unlawful detainer.

2. Appellants seek ruling that if there were "payoffs" on pinball machines and punch boards then the Utah gambling statutes are unconstitutional and such conduct is not unlawful.

3. In the alternative, appellants seek ruling that the issue of gambling be decided by a jury; and that gambling, if any, as an "unlawful business" under 78-36-3(4), 1953 UCA, or as a "material breach" of lease be determined by a jury these questions being issues of fact,

not properly ruled on as a matter of law by the Trial Court.

STATEMENTOF FACTS

In 1964, plaintiff and defendant extended a prior lease made in 1962, and entered into a new three year lease commencing April 15, 1965 for a cafe and cafe equipment at 890 West 2100 South Street, Salt Lake County. There was prepayment by appellants of $1,500 under the new lease, as rental for the last 5 months of the new term, which expires May 14, 1968.

Monthly rentals payments of $300 were always paid when due, or in advance.

Without consent or knowledge of appellants, plaintiff executed lease agreement on August 13, 1965, with American Oil Company, covering certain other property, but including the property already under lease to appellants. Under the American Oil Company lease, plaintiff received the sum of $4,500 as advance rental for the first 6 months, together with the sum of $1,500, in return for which plaintiff was to obtain cancellation of defendants-appellants' lease (R. 47).

The "cancellation" attempt resulting from this agreement with American Oil Company was the hiring of persons who executed affidavits in support of plaintiff's first motion for summary judgment based on gambling. (R. 16, 17, 19). The $1,500 lease prepayment made by appellants was tendered into court by plaintiff upon filing the complaint. It is the same amount gotten from American Oil Company in consideration for getting de-

fendants off the property later leased to American Oil Company, despite appellants' prior lease.

The $1,500 received by plaintiff from American Oil Company and tendered into court by plaintiff was, of course, promptly sequestered and taken back on the same day of the last argument for summary judgment, pursuant to the order signed that day (R. 55).

The day after the order was signed, appellants received phone notice of the entry of judgment, but not of the order for release of money. Appellants were not served a copy of the Findings of Fact, Conclusions of Law and Judgment until about a week later. It will be noted that the certificate of mailing on the Findings of Fact and Conclusions of Law is blank, and is erroneous, R-54, giving good further reflection of the cavalier attitude and abuse of process by plaintiff throughout this entire proceeding.

Point I

ARGUMENT

"PAYOFFS" ON PUNCH BOARDS AND PINBALL MACHINES IN A CAFE IS NOT SUFFICIENT GROUNDS TO FOUND AN ACTION IN UNLAWFUL DETAINER OR TO CAUSE FORFEITURE OF A LEASE.

It isn't disputed that plaintiff's sole claim to lease forfeiture and restitution of premises is founded on alleged "payoffs" by defendants on puch boards and pinball machines, as is apparent from plaintiff's complaint,

R. 1; plaintiff's notice of April 11, 1966, R. 4; and the notice of June 3, 1966, R. 6.

Defendants contend that even if there were "pay-offs," which to this point is not proved it being an issue of fact, then the harsh remedy of unlawful detainer and forfeiture should not be made available to plaintiff to cancel this lease, but rather plaintiff's remedy would be an action for damages or for injunctive relief.

This particular point was raised in a lessor's attempt to forfeit a lease because horse-race bets were taken by the lessee of a cafe. The California District Court of Appeals decided in *Keating vs. Preston, 108 Pac. 2nd 479,* that forfeiture would not be permitted even though there was an illegal use by gambling. The California court held that lessor's proper action was in damages or for an injunction, not forfeiture which is historically frowned upon by the courts.

Appellants also urge the court to consider that having pinball machines and punch boards on these cafe premises is not the reason for this action, but rather it is that plaintiff has been able to obtain a better agreemen with a different lessee for much more money. Defendants have been in the cafe business for 25 years without any trouble of any kind, and in possession of this cafe since 1962 — and isn't it odd that all of this suddenly results when American Oil Company enters the scene?

For the conspiratorial note involved in this hurried and abusive action, appellants again emphasize that American Oil Company paid $1,500 to plaintiff to ob-

tain cancellation of defendant's lease right (R. 47). The great hurry is that the Oil Company wants to tear the building down and get on with its own construction on appellant's property, (R. 49).

As before stated, though this action is treated as being in unlawful detainer, plaintiff's complaint theory is breach of agreement.

Paragraph 6 of plaintiff's complaint, R. 2, reads:

> "It is understood and agreed that the leased premises shall be occupied and used as a restaurant and cafe only and for no other purpose whatever, and the Youngs agree to conduct said business strictly in compliance with law."

That allegation quotes a provision of the lease, and defendants claim violation thereof by maintaining a "gambling house."

As pertains to this particular facet of plaintiff's claim, appellants call the court's attention to the need to establish materially of breach in order to found recission.

There is fair summary of the law to be applied to the facts here at *12 Am Jur Contracts, Sec. 440,* where it is stated:

> "It is not every breach of a contract or failure exactly to perform — certainly not every partial failure to perform — that entitles the other party to rescind.
>
> "A breach which goes only to a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a recission

> of the contract; the injured party is still bound to perform his part of the agreement, his only remedy for the breach consists of the damages he has suffered therefrom. A recission is not warranted by a breach of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement. Before partial failure of consideration of one party will give the other the right of recission, *the act failed to be performed must go to the root of the contract* where the failure to perform the contract must be in respect of matters which would render the performance of the remainder a thing different in substance from that which was contracted for." (Emphasis supplied)

In the case at bar, what is the state of evidence as to the materiality of breach by defendants, if indeed there was a breach? :

1. There are allegations of gambling in the complaint (R. 1).

2. The allegations are denied in the answer, claiming if gambling is proved, such is not a material breach (R. 8).

3. There are 3 affidavits by plaintiff's hirelings, alleging "payoffs" (R. 16, 17, 19).

4. There are 2 affidavits by defendants denying same (R. 23, 26).

5. There is defendant's refusal to answer questions concerning "payoffs" in his deposition, (R. 60, pages 3, 4, 5, 6), based on the 5th amendment to the United States Consitution.

Since the affidavits and the pleadings now stand in equipoise, there is a reserved question of fact for determination by the jury.

Also, where is evidence of materiality which can be a question of fact? There is none, except what may be determined by a jury under proper instructions, *if* gambling is found to be the fact by the jury. Further, the state of evidence, if the matter is tried as it should be, could well warrant a finding as a matter of law, that such gambling as may be proved, if at all, is not a *substantial* breach that would relieve the landlord from continuing to perform her part of the agreement. Her remedy would be for damages, if she could prove them.

The proper remedy for all concerned as appellant sees it, would be to let the plaintiff and American Oil Company resolve their own differences and teach those people that prior written obligations are not to be so lightly treated.

Further, Sec. 78-36-3(4), 1953 UCA, states that to found an action in unlawful detainer there must be conducted "unlawful business." Appellants contend that plaintiff must prove a "business" of gambling, not merely an incident of the operation of a cafe business. Both concepts, statutory "business" and "breach of a lease condition" relate to materiality, which is a question of fact.

The evidence, if this matter is remanded for orderly Judicial Proceedings and trial by jury, as is appellants' constitutional right, will show there was no statutory "unlawful business."

Business is defined as "one's regular work occupation or employment," *Webster's Collegiate Dictionary, 5th Edition page 137.* Appellants' business is running a cafe. If there were payoffs, which respondent must prove, then she must also prove that was the "business" of appellants, and not just incidental to the business of running a cafe. She must prove that the tail wags the dog.

Point II.

UTAH STATUTES MAKING "PAY OFFS" ON PINBALL MACHINES AND PUNCH BOARDS FELONIOUS ARE UNCONSTITUTIONAL BECAUSE OF INVALID CLASSIFICATION, IMPROPER DELEGATION AND AMBIGUITY.

Gambling offenses in the State of Utah are set forth in title 76, chapter 27, Secs. 1 et seq. 1953 Code Annotated. In the entire chapter, there is only one section which reasonably describes the offense of gambling by pinball machines and by punch boards, that is Sec. 1 which makes it a felony, supra, *D' Orio vs. Startup Candy Co., 71 U 410, 26 Pac. 1037.*

Appellants contend that because of that, the entirety of Title 76, chapter 27 in unconstitutional, as it is invalid classification which is prohibited by the provisions of Article 1, Section 2 and 24 of the Utah State Constitution and the 14th amendment to the United States Constitution. This is so for the reason that operation of pinball machines and punch boards for gaming is made a felony, but the operation of a slot machine, for gaming or exhibition of bawdy pictures constitutes only a misdemeanor, 76-27-8; lottery is punishable as a misdemean-

or, 76-27-9; 76-27-10. The sale of vending tickets or other chances is a misdemeanor, 76-27-11, as are the remaining purportedly proscribed games in the rest of the sections of title 76, chapter 27, which include other types of lottery and bingo; bookmaking; pool selling; option selling, and all kinds of contests of chance and skill involving speed and powers of endurance of man and animal.

Appellants urge it to be fundamental that for the State to make it a felony to play with punch boards and pinball machines but only a misdemeanor to run a slot machine, horsebook, all types of pool bets and drawings, boxing contests, ad infinitum, is obviously so discriminatory that the entire chapter should be stricken, there being no savings clause.

Appellants acknowledge that an act shall not be deemed unconstiutional because of discrimination so long as there is reasonable basis for differentiation between classes and there is proper relation to the purpose to be accomplished by reason of difference.

It would be an onerous burden for this court to attempt to uphold apparent legislative expression that it is far worse, from a public policy standpoint, to pay on a pinball machine or a punch board than it is to operate a "one-armed bandit," which crime is only declared to be a misdemeanor, or to play bingo, or take bets on the fights or the ponies, all misdemeanors.

If it be urged that the operation of pinball machines and punch boards can be fitted into one of the misdemeanor sections of title 76, chapter 27, then there is

sufficient ambiguity to render the entire chapter unconstitutional.

Further, if pinballs and punch boards can be made to fit any of the misdemeanor sections, then the entire chapter is also unconstitutional because of unauthorized delegation by the legislature of authority to police officers and prosecuting attorneys to determine, willy-nilly, whether a person committing one act should be charged as a felon or a misdemeanant. The case of *United States vs. Louisville Nashville Railroad Company, 176 Federal 942,* stands for the proposition that a crime can be created only by a public act. The language of the act must be sufficient to completely declare and define the crime and affix the punishment. The court in that case stated that it is not competent for congress to delegate to the president or to the head of an executive department the power to declare what facts may constitute an offense. Appellants also contend there shouldn't be authority to determine degree, either — on the same set of facts.

Southwest Engineering Company vs. Ernst (Ariz), 291 Pac. 764 states that indefiniteness of a statutory regulation may be treated as an invalid delegation of power. The case holds that statutory language imposing duties must be so sufficient and definite as to serve as a guide to those who have the duty imposed upon them. If there is not sufficient literal significance of language to be capable of intelligent interpretation, such act would violate the Constitutional mandate, directing that the powers of the three branches of government be separate. A legislative body cannot confer unlimited power upon an officer without designating standards to guide his

action, supra *In Re Petersen, 331 Pac. 2nd 24 (Calif.).*

It is respectfully submitted that the gambling statutes of Utah are unconstitutional based on invalid classificaion and ambiguity. They are also unconstitutional because of unauthorized delegation of power if it is found that paying off on pinball machines and punch boards can be either a misdemeanor or a felony under Utah Code.

It is evident that if there is no crime because of these Constitutional objections, then plaintiff-respondent has no standing to charge unlawful activity of any kind or nature.

Point III.

GRANT OF SUMMARY JUDGMENT WHERE THERE IS CONTROVERTED MATERIAL FACT IS REVERSIBLE ERROR.

The trial court granted summary judgment in favor of Respondent under Rule 56 (c) URCP, which is authorized:

> "If the pleadings, depositions and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Respondent's motion for summary judgment was supported by self-serving affidavits of plaintiff's son and other paid hirelings. (R. 16, 17, 18, 19). Each relevant statement of plaintiff's affidavits has been specifically denied by opposing affidavits executed by defendant-appellant. (R. 23, 26).

This court in *Christensen vs. Financial Service Company, 14 U 2nd 101, 377 Pac 2nd 1010,* held that conditions for summary judgment are obviously not met if the allegations of the pleadings stand in opposition to the averments of affidavits so that there are controverted issues of fact, the determination of which is necessary to settle the rights of the parties. That case distinguished *Dupler vs. Yates, 10 U 2nd 251, 351 Pac. 2nd 624,* as well as *Continental Bank and Trust Company vs. Cunningham, 10 Utah 2nd 329, 351 Pac 2nd 168,* in which cases it was found that the affidavits, exhibits and documentary evidence did in fact resolve all material facts and in which cases the germane affidavits were not denied or controverted by opposing affidavits.

In the case at bar, there is total absence of any documentary or other type independent evidence to enable the court to find that the facts as claimed by plaintiff-respondent are irrefutably established. In this case, the allegations in the pleadings stand in opposition to what is stated in the self-serving affidavits of plaintiff. In addition, the opposing affidavits of defendant expressly controverts every material statement contained in plaintiff-respondent's affidavits.

As has been stated, the only additional matter considered by the Trial Court in the second argument of plaintiff-respondent's motion for summary judgment was the deposition of defendant when he refused to answer questions concerning "payoffs" on the grounds of self incrimination under the 5th amendment to the United States Constitution (R. 60, pages 3, 4, 5 and 6).

Appellants concede that refusal to testify may prop-

erly be considered by the trier of fact, under proper instruction from the court.

Plaintiff's attorney also agrees with the concept of law as appellant urges it. In the deposition of Preston L. Young taken July 29, 1966, the following took place after defendant's counsel advised defendant to refuse to answer questions concerning gambling (R. 60, pages 5-6):

> "*Question by Mr. King*: Has your attorney advised you that refusal to answer in a civil action because your answer might intend to incriminate you, might induce the court to assume that your answer might be unfavorable?"
>
> "*Answer*: I refuse to answer based on the 5th amendment."
>
> "*Question*: The refusal to answer doesn't lie on that because there is no fact involved there."
>
> "*Mr. Bridwell*: For your information Mr. King, that happens to be wrong. Yes, we have discussed that with him."
>
> "*Mr. King*: You have discussed with him that his refusal to answer this type of question will probably result in the court finding the fact that he has?"
>
> "*Mr. Bridwell*: I think that is a question for the trier of facts. Since you are counsel and not judge, that would be up to the judge or trier of facts. In this case it would be a jury. There is a rebuttable presumption, or more accurately stated: it would entitle you to an instruction to the jury that they may find that way because of the refusal."

> "*Mr. King*: I will accept that as being an accurate statement."

Appellants feel that the right to reversal is so elemental that they will not belabor this. However, in point is the language contained at 20 Am. Jur., Evidence, Sec. 190:

> "The law creates a presumption, where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, that his testimony, if introduced, would be adverse to his interest."

But, as stated at page 194 of 20 Am. Jur.:

> "*In any event, where the presumption does ordinarily apply, it will be viewed as partaking of none of the character of affirmative proof. The presumptive effect of the failure of a witness to testify is obviously not tantamount to proof of the fact sought to be established through such witness.* (Emphasis supplied).

As has been set forth by this Court in *Bullock vs. Desert Dodge Truck Center, Inc 11 Utah 2nd 1, 354 Pac. 2nd 599,* there must be a showing to authorize summary judgment that is supported by evidence, admissions and inferences which, when viewed in the light most favorable to the loser, reveals there is no genuine issue concerning any material fact. That showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which could reasonably sustain a judgment in his favor. Obviously, credibility of plaintiff-respondent's witnesses is for the jury to determine, after having received the benefit of cross examination by defendant's lawyers.

There is no ground upon which the trial court could possibly be sustained in granting plaintiff-respondent's motion. Such ruling is inconsistent with fair play and the concept that a citizen is entitled to his day in court.

CONLCUSION

It is clear appellant is entitled to a trial by jury — with an added admonition by the court that trial proceedings should move with expedition, but not by use of abusive process. This is a good case to set forth cautionary words for the benefit of future zealots, pushing untenable position for unworthy motive.

It is urged that the court announce that even if plaintiff were to prevail in a trial by jury that defendants were gaming, which has not been proved at this point, that such cannot serve to revoke a lease because legislative intent concerning gaming as set forth in Chapter 27, Title 76, 1953 UCA is not capable of intelligent interpretation or application — or if it is definite, it is so far from reality and the sound constitutional concepts of reasonable classification as to be void.

Respectfully submitted,

BRIDWELL & RIMENSBERGER
By GEORGE E. BRIDWELL

Received two true copies hereof this 28th day of October, 1966.

.....

K. SAMUEL KING
Attorney for Respondent